

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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PAUL PORTACIO,

Plaintiff,

-against-

CANADIAN IMPERIAL BANK OF COMMERCE,

Defendant.

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MEMORANDUM
AND ORDER

Civil Action No.
96-Civ-0304 (DGT)

TRAGER, District Judge:

Plaintiff, who granted defendant a mortgage on plaintiff's home, brings this lawsuit to enjoin defendant from increasing the interest rate on the mortgage and demanding that the mortgage be paid in full at this time. Defendant moved for summary judgment on the ground that the terms of the rider to the mortgage and the adjustable rate mortgage note clearly and unambiguously authorize defendant to call the mortgage at this time. For the reasons stated below, defendant's motion for summary judgment is denied.

Background

Plaintiff is a former employee of defendant Canadian Imperial Bank of Commerce ("CIBC") who was terminated as part of a reduction in force on or about August 30, 1995. At the time of plaintiff's termination, CIBC held a mortgage on plaintiff's house, which mortgage also contained a Rider to Mortgage ("Rider"). CIBC also held an Adjustable Rate Mortgage Note ("Note") signed by plaintiff. Pursuant to the terms of the Rider and the Note, both of which were executed by plaintiff on or about February 3, 1993, plaintiff received a preferential mortgage rate while employed by CIBC. Plaintiff obtained this

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mortgage in connection with his relocation from CIBC's Atlanta office to the bank's New York office.

The Mortgage Rider at paragraph 25 and the Note at paragraph 12 contained the following identical language:

Notwithstanding anything contained herein to the contrary, if Borrower ceases to be employed by Canadian Imperial Bank of Commerce (hereinafter referred to as "CIBC"), its successors or assigns, the unpaid principal and all accrued interest thereon shall become immediately due and payable and the interest rate payable hereunder shall be automatically changed to a rate per annum equal to three percent (3%) in excess of Lender's Prime Interest Rate (as said term is defined hereinafter) then in effect. Any change in Lender's Prime Interest Rate shall effect an adjustment in the interest rate of this Note without notice to the Borrower of the day on which such change occurs. Lender agrees not to make demand for payment hereunder for ninety (90) days after Borrower ceases to be employed by Lender. Lender's Prime Interest Rate shall be the rate publicly announced by Lender from time to time as the interest rate charged its preferred business customers (commonly referred to as "Lender's Prime Interest Rate") (emphasis added).

Plaintiff, who was represented by counsel, signed the Mortgage, the Rider, and the Note. Thus, according to defendant, plaintiff agreed in writing that if his employment with CIBC was terminated, CIBC could increase the interest rate to prime plus three percent and, after ninety days from the date of termination, could make demand for payment of the full amount due. Upon plaintiff's termination, CIBC indicated that it intended to increase the rate of interest and to eventually demand payment on the note. Plaintiff then commenced this action.

Discussion

(1)

CIBC argues that the Rider and the Note expressly authorize CIBC to increase the interest rate and call the mortgage upon plaintiff's termination. CIBC further notes that plaintiff does not deny that he signed the Mortgage, Rider, and Note at issue in this case, and that plaintiff admitted at deposition that he was represented by counsel at the time he signed these documents and was satisfied with that representation.

Plaintiff seeks to enjoin CIBC from raising the interest rate and prematurely calling the mortgage in full by claiming that on at least one occasion during 1992, the year before he signed the Rider and Note and prior to his relocation from Atlanta, certain CIBC employees, particularly a Mr. John Heaney, then Associate Director of Human Resources, told him he would be able to retain the mortgage forever at the preferential rate even if he were to be terminated. Heaney denied at his deposition that he ever said anything of the sort to plaintiff.

In further support of his contention that CIBC is precluded from calling the mortgage at this time, plaintiff relies upon language in CIBC's Bank Relocation Manual ("Relocation Manual"), the provisions of which plaintiff claims he discussed with Heaney. The relevant provision of the Bank Relocation Manual states:

Any employee who terminates employment with the bank must pay off the loan (principal and interest) within 90 days of termination. During the intervening period,

the interest rates will increase to a floating rate of Prime plus 3%.

Bank Relocation Manual, Def. Ex. D (emphasis added). Plaintiff contends that he interpreted this language to mean that he would be required to pay off the mortgage if he resigned, but that the mortgage would continue if he were involuntarily terminated by CIBC. Plaintiff claims that Heaney confirmed this interpretation at the time they discussed the provisions of the Relocation Manual.¹ Plaintiff argues that he relied both on the language of the termination provision of the Relocation Manual, and upon Heaney's explicit confirmation of plaintiff's interpretation of this provision, when he decided to leave Atlanta and relocate to New York. Plaintiff asserts that if he were now required to go to the open market for refinancing, he would be exposed to a very substantial increase in the interest rate between the present mortgage held by the bank and any new mortgage that could be obtained. Plaintiff believes that the bank should be estopped

¹ At his deposition, plaintiff described a meeting he allegedly had with Heaney in approximately September of 1992, prior to his relocation to New York, concerning the provisions of the Relocation Manual. Plaintiff testified that in response to plaintiff's concerns about losing the mortgage at some point: "[a]nd basically, with looking at the [bank relocation] policy, it was stated that 'Well, the bank's not going to get rid of you. However, if they do get rid of you, it states here that you don't have to pay.' - 'you don't have to get out of the mortgage. That only if you leave that you would need to pay the mortgage.'" Pl. Dep. at 25, lines 12-18. Plaintiff testified that this meeting with Heaney lasted approximately ninety minutes. See id. at 27, lines 24-25. Plaintiff also testified that he had conversations with other CIBC management employees, including Gary Rado, plaintiff's system's head, Mark Javier, and Thomas Fitzhenry, concerning the effect of termination on the mortgage. See id. at 25-26.

from calling the mortgage at this time, in view of the termination provision in the Relocation Manual and his involuntary separation from CIBC.

Defendant contends that plaintiff's arguments are without merit and that the Rider and Note signed by him, while he was represented by counsel, clearly and unambiguously provide that the interest rate would increase and that the loan could be called ninety days after an employee ceases to be employed by CIBC. Defendant argues that the language of the Relocation Manual and prior oral statements, even if they did occur, cannot alter or modify a subsequent written agreement.

(2)

It is undisputed that the Mortgage Rider and the Note, both of which were signed by plaintiff while he was represented by counsel, unambiguously provide that if the borrower ceases to be employed with CIBC, the latter may increase the interest rate and further, may call the mortgage ninety days later. However, plaintiff does not sue on the terms of the Mortgage Rider or Note. Rather, plaintiff sues under the terms of the Bank Relocation Manual, which plaintiff contends formed a contract with legally enforceable obligations.² Arguing by analogy to the body of case law addressing the employment at will doctrine, in

² Although plaintiff's complaint is styled as a claim for reformation of contract to bring the Rider and Note into conformity with the termination provision of the Bank Relocation Manual, from a procedural standpoint his claim is technically one for breach of contract, the damages for which would be the amount equivalent to the difference in the interest rate between the mortgage obtained through CIBC and any mortgage he would be forced to secure through the open market.

which employer handbooks and manuals, under certain circumstances, have been held to give rise to an employment contract, plaintiff contends that the Relocation Manual at issue here formed a contract and that plaintiff relied on the terms of that contract when he decided to leave Atlanta and relocate to New York.

In Weiner v. McGraw Hill, Inc., 57 N.Y.2d 458, 457 N.Y.S.2d 193 (1982), the New York Court of Appeals articulated the circumstances under which an employer handbook or manual will give rise to an employment contract, thereby modifying the presumption in New York of employment at will. In that case, an employee accepted employment based on oral assurances that the employer would not discharge him without cause. This assurance was expressly incorporated in writing into the employee's employment application, which expressly specified that his employment would be subject to the provisions of the employer's handbook and that the employee would only be discharged for cause. Thereafter, the employee, in good faith reliance, left his previous employer, foregoing all of his accrued fringe benefits and a salary increase, to accept the position. The court found that these facts gave rise to an action for breach of contract. In so holding, the New York Court of Appeals emphasized the reliance factor, noting that the employee had been induced to leave his previous employment with the assurance that McGraw-Hill, the defendant, would not discharge him without

cause, and that he had foregone certain benefits by relying on this assurance. Id. at 465.

Defendant argues that plaintiff here has not met the reliance requirement of Weiner. Defendant argues that "in fact, instead of acting consistently with his alleged understanding of the Manual, plaintiff, while represented by counsel, signed two documents that expressly permitted termination of the notes upon termination of employment." Def. Supplemental Mem. at 3. Thus, defendant argues, there is no basis for analogizing plaintiff's case to Weiner. Defendant contends that New York courts have long recognized that the mere existence of a written policy without the additional elements identified in Weiner does not give rise to an enforceable claim by the employee against the employer. See De Petris v. Union Settlement Ass'n, Inc., 86 N.Y.2d 406, 633 N.Y.S.2d 274 (1995).

While it is clear that reliance is an indispensable element that must be proven in order to transform an employer handbook or manual into a legally enforceable contract, it is equally clear that if the conversations plaintiff claims to have had with Heaney and other CIBC employees regarding the meaning of the termination provision of the Relocation Manual in fact did occur, plaintiff here will have shown reliance. However, this question, one of material fact, appears to be directly in dispute. Heaney admitted at deposition that he likely provided plaintiff with a copy of the Bank Relocation Manual prior to plaintiff's relocation and that he remembers having at least one meeting with

plaintiff in person. While he testified that he did not recall having any conversations with plaintiff concerning the meaning of any specific provisions of the manual, Heaney specifically denied under oath that he ever made the statements plaintiff claims he made concerning the interpretation of the termination provision of the Relocation Manual.³ It is somewhat curious that Heaney

³ The following exchange took place at Heaney's deposition:

"Q: Have you searched your recollection . . . so that you can tell me if there is anything that you have to tell me about what you recall you and Mr. Portacio talked about concerning his mortgage financing in connection with his return to New York?

A: I looked at Mr. Portacio's transcript from his deposition. It was pointed out to me that he said that I had made a few statements to him that says - and I can quote from that - 'The bank's not going to get rid of you. However, if they do get rid of you, it states that you don't have to pay. You don't have to get out of the mortgage. That's only if you leave that you would need to pay the mortgage.' I never said that to Mr. Portacio.

Q: Did you discuss with Mr. Portacio the language in the relocation policy manual on page 21 . . . ?

A: No, I don't recall having discussed that particular page with him.

* * *

Q: Do you recall having delivered the manual . . . to Mr. Portacio?

A: As I stated previously, I assume I delivered the manual to him. That would have been the normal process, and since he got the manual, I will assume that I delivered it to him.

* * *

Q: Do you recall in connection with the delivery of the manual that you and Mr. Portacio looked at any particular portion of the manual in connection with any meetings you had with him?

A: No. No, I don't recall that.

(continued...)

does not seem to recall any specifics of his conversation with plaintiff during their meeting, yet he clearly remembers that he did not issue the interpretation of the termination provision that plaintiff claims he did. Plaintiff, on the other hand, testified that in deciding whether to relocate, he relied on the interpretation of the termination provision of the Relocation Manual that he now proffers, and on Heaney's and other CIBC employees' articulation of that interpretation.⁴ The obvious factual contradiction that exists regarding whether certain statements about the meaning of the termination provision of the Relocation Manual were made to plaintiff prior to his relocation to New York renders this question inappropriate on a motion for summary judgment.

Furthermore, the fact that plaintiff, subsequent to examining the Bank Relocation Manual, signed the Mortgage Rider

³(...continued)

Q: You don't recall any discussion concerning the specifics of the manual?

A: No, I don't."

Heaney Dep. at 23-25.

⁴ Plaintiff testified with respect to his meeting with Heaney that "[a]gain, I mentioned to him about my concerns with coming back to New York regarding mortgages and - well, first of all, we talked about the rates. The rates was a big topic of mine with relation to purchasing a home in New York." Pl. Dep. at 28, lines 12-16. Plaintiff also testified that he spoke with Mr. Rado about the mortgage and the mortgage interest rate. "Again, I presented to him what the policy stated because you never know what could happen in New York with down-sizing and all." Id. at 31, lines 11-14.

and Note, both of which expressly contradict plaintiff's alleged understanding of the termination provision in the Relocation Manual, adds little credibility to CIBC's argument. CIBC argues that the fact that plaintiff signed these documents after seeing the Relocation Manual and while represented by counsel obviates plaintiff's claim of reliance. In order for reliance to be obviated, however, CIBC would need to demonstrate that the subject of the substantive discrepancies in the termination provisions of the mortgage documents and the Bank Relocation Manual was actually discussed during the mortgage negotiations between plaintiff's attorney and the attorneys representing CIBC. In other words, there is no indication that plaintiff's attorney was made aware of the existence of the Relocation Manual in the course of negotiating what would otherwise be a fairly routine mortgage agreement.⁵ If this were the case, and assuming that plaintiff left the technical details of securing the mortgage to his attorney, plaintiff's reliance on the termination provision of the Relocation Manual as he claims it was explained to him would not be mitigated. Here again, however, there exists a question of material fact which precludes a granting of summary judgment in favor of defendant.

⁵ Neither is there any evidence that defendant CIBC's attorneys were aware of the Bank Relocation Manual. If defendant's counsel was aware of the terms of the Bank Relocation Manual and failed to disclose this information during the mortgage negotiations, this would raise an entirely separate set of issues.

CIBC also contends that in any event, the provision of the Relocation Manual is of no import because the provision is consistent with the termination sections of the Rider and Note. CIBC argues that any prior oral statements made by Heaney to plaintiff, even if they did occur, cannot alter or modify a subsequent written agreement. Contrary to CIBC's assertion that the language of the Relocation Manual is consistent with the terms of the mortgage documents, however, plaintiff's reading of the termination provision in the Relocation Manual to mean that CIBC is only authorized to raise the interest rate and accelerate the mortgage when an employee/borrower leaves CIBC voluntarily, appears to be a plausible one. At the very worst, the provision can be said to be ambiguous, in which case parol evidence in the form of prior oral statements would be admissible in order to ascertain the true meaning of the provision and correct the ambiguity. It also must be noted that the provision in question was drafted by CIBC and thus, is to be construed against the bank in the event of an ambiguity. See Albany Savings Bank v. Halpin, 117 F.3d 669, 673 (2d Cir. 1997); FDIC v. Suna Assocs., Inc., 80 F.3d 681, 685 (2d Cir. 1996). This fact alone warrants a denial of defendant's motion for summary judgment.

For the reasons discussed above, defendant's motion for summary judgment is denied.

Dated: Brooklyn, New York
August 21, 1998

SO ORDERED:



David G. Trager
United States District Judge

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